NO. 85-1986

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIS WALTER HOLLOWAY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS

FOR THE ELEVENTH CIRCUIT

WILLIAM ROBERTS WILSON, JR.
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QUESTIONS PRESENTED

Whether a showing of prejudice is required to dismiss an indictment due to prosecutorial misconduct (threats of prosecution of prospective witnesses). There is a division of authority among the circuits. See e.g.:

United States v. Serubo, 604 F.2d 807 (CA3 Pa. 1979) an indictment should be dismissed for prosecutorial misconduct in absence of showing of prejudice.

United States v. McKenzie, 678 F.2d 629 (CA5 La. 1982) cert. den. 459 U.S. 1038, 1035 S.Ct. 450, 74 L.Ed.2d 604 (La. 1982) an indictment should be dismissed for prosecutorial misconduct in presence of showing of prejudice.

PARTIES IN COURT BELOW

United States of America

J. B. Sessions, III

United States Attorney

Southern District of Alabama

Willis W. Holloway, Jr., defendant Alabama attorney

Elwood L. Hogan, defendant Circuit Judge for the Thirteenth Judicial Circuit of Alabama (Mobile County)

James D. Sullivan, defendant District Judge for Mobile County, Alabama

Durwood L. Elliott, defendant supervisor for Alabama Beverage Control Board (A.B.C.), Enforcement Division

William "Billy" Broadus, defendant proprietor of Dunn's Bonding Company in Mobile, Alabama

James Dodson Fail, Sr., defendant employee of Broadus Bonding Company

Thomas M. Whithers, defendant automobile salesman employed by Robinson Brothers Lincoln-Mercury in Mobile, Alabama

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OPINION BELOW

In United States v. Holloway, 778 F.2d 653 (CA11 Ala. 1985) the Court affirmed the United States District Court for the Southern District of Alabama holding that there was insufficient prosecutorial misconduct (threatening prospective witnesses) to support Holloway's Rule 12(b) F.R.Cr.P. Motion to Dismiss Indictment and Rule 12(g) and 45(d) F.R.Cr.P. Motion for Evidentiary Hearing [778 F.2d 658].

JURISDICTION

Petitioner was Defendant/Appellant in the United States Court of Appeals for the Eleventh Circuit. No stay of mandate was sought or granted.

This Petition is timely filed within 60 days of the Court of Appeals decision

(December 16, 1985). Supreme Court Rules 20. Jurisdiction is invoked pursuant to 28 U.S.C. §1254 and §2103.

PROVISIONS, STATUTES, AND SUPREME COURT DECISIONS INVOLVED

Constitutional Provisions:

Amendment V

Amendment VI

Amendment XIV, Section 1

Decisions:

McNabb v. U.S., 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (Tenn. 1943)

Costello v. U.S., 350 U.S. 359, 76 S.Ct. 406 100 L.Ed. 397 (N.Y. 1956)

Mesarosh v. U.S., 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (Pa. 1956)

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (Tex. 1967)

U.S. v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (D.C. 1971)

Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (Tex. 1972)

U.S. v. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (Pa. 1981)

United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (Ill. 1983)

Statutes:

18 U.S.C. §2

18 U.S.C. §1343

18 U.S.C. §1952

18 U.S.C. §1962

18 U.S.C. §1982

Rules:

Rule 12 Federal Rules of Criminal Procedure

Rule 47 Federal Rules of Criminal Procedure

Rule 45 Federal Rules of Criminal Procedure

STATEMENT OF THE CASE

1.

PROCEEDINGS BELOW

a.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Petitioner was indicted for his alleged participation in a scheme to purchase favorable rulings in criminal cases in return for monetary payments to the presiding state judge. The four (4) indictment counts were:

1. Conducting business through racketeering in violation of 18 U.S.C. §1962(c) and 18 U.S.C. §2;

2. Conspiracy to conduct business of racketeering in violation of 18 U.S.C. §1982(d);

3. Interstate travel to aid in racketeering in violation of 18 U.S.C. §1952 and 18 U.S.C. §2; and

4. Fraud by wire in violation of 18 U.S.C. §1343.

Pursuant to Rules 12(b) and 47 F.R.Cr.P. Petitioner filed a pretrial Motion to Dismiss the Indictment due to prosecutorial misconduct, i.e. harassing and intimidating potential witnesses by threats of prosecution for perjury, bribery of a state judge, and revocation of probation. Petitioner also filed a Motion for an Evidentiary Hearing pursuant to Rules 12(c), 12(g) and 45(d)

F.R.Cr.P. The District Court denied the Motions.

Petitioner was convicted on all counts and received sentences of 20 years each on counts 1 and 2 and 5 years each on counts 3 and 4 with all sentences to run concurrently.

b.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

On appeal, the Eleventh Circuit noted the division among the circuits regarding prosecutorial misconduct [778 F.2d 659] citing United States v. Serubo, 604 F.2d 807 (CA3 Pa. 1979) [showing of prejudice not required] and United States v. McKenzie, 678 F.2d 629 (CA5 La. 1982) cert. den. 459 U.S. 1038, 103 S.Ct. 450,

74 L.Ed.2d 604 (La. 1982) [showing of prejudice required].

In United States v. Holloway, 778 F.2d 653 (CA11 Ala. 1985), the Court held that the evidence presented "no showing of prosecutorial misconduct" [778 F.2d 658]. The Court, following United States v. Pabian, 704 F.2d 1533 (CA11 Fla. 1983), reserved ruling on whether a showing of prejudice should be required [778 F.2d 659].

2.

STATEMENT OF FACTS

Petitioner was arraigned on November 10, 1983. Petitioner filed a pretrial motion to dismiss the indictment against him upon grounds of prosecutorial misconduct. Specifically Petitioner presented testimony from:

a. Joyce Chapman - she was rearrested on charges previously nolle prosequi in 1981 and was threatened with prosecution. [778 F.2d 656].

b. Frank Parker - he was threatened with prosecution for bribing a state judge and perjury. [778 F.2d 656].

c. Samuel Robert Greene, III - he was threatened with prosecution for bribing a state judge and perjury. [778 F.2d 657].

d. Gary Steven McGarver - he was on probation for assault and facing a new assault charge and was threatened with prosecution for bribing a state judge, perjury, and revocation of probation [778 F.2d 657].

The prosecution further made promises of leniency and reward for these witnesses' testimony. This completed the reward and retribution prosecutorial scheme. The scheme resulted in testimony favoring the prosecution before the grand jury. Petitioner's due process and equal protection rights were thus violated.

Orders were entered on January 23, 24, and 25, 1984 denying Petitioner's Motion to Dismiss, Motion to Cite the U.S. Attorney for Contempt, and Motion for a Hearing on these Motions. Again, Petitioner's right to a due process hearing was denied and Petitioner's right to equal protection of the law was denied.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Guided by considerations of justice and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or Congress. U.S. v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 at 1878, 76 L.Ed.2d 96 (Ill. 1983); McNabb v. U.S. 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (Tenn. 1943). The lower courts erred in failing to exercise their supervisory authority and to dismiss Petitioner's indictment due to prosecutorial misconduct (threatening witnesses).

Even clear evidence of guilt does not justify prosecutorial misconduct.

U.S. v. Hasting, supra, at 103 S.Ct. 1982.

A.

Sixth Amendment rights are incorporated into the Fourteenth Amendment. The right to confront witnesses and the right to present defense witnesses are fundamental rights of due process of law. Washington v. Texas, 388 U.S. 14 at 17-19, 87 S.Ct. 1920 at 1922-1923, 18 L.Ed.2d 1019 (Tex. 1967).

Threats of prosecution against witnesses testifying for the defense are intolerable. Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. U.S. v. Goodwin, 625 F.2d 693 at 703 (CA5 Fla. 1980).

Threats of prosecution against witnesses sought by the prosecution are equally reprehensible. U.S. v. Morrison, 449 U.S. 361 at 363-364, 101 S.Ct. 665 at 667-668, 66 L.Ed.2d 564 (Pa. 1981).

Where the prejudice is a continuing one which cannot be remedied by a new trial or suppression of evidence, then drastic action is justified. U.S. v. Morrison, supra, 449 U.S. 365 fn.2, 101 S.Ct. 668 fn.2 citing U.S. v. Marion, 404 U.S. 307, 325-326, 92 S.Ct. 455, 465-466, 30 L.Ed2d 468 (D.C. 1971).

Where Sixth Amendment rights are violated, then there is a per se violation of due process. See e.g.: Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (Tex. 1972); U.S. v. Hammond, 598 F.2d 1008 at 1013 (CA5 Fla. 1979) on

reh. 605 F.2d 862 (CA5 Fla. 1979); and U.S. v. Godwin, 625 F.2d 693 at 702-703 (CA5 Fla. 1980).

No prejudice need be shown. U.S. v. Goodwin, 625 F.2d 693 at 703 (CA5 Fla. 1980).

In this case, the prosecution intimidated government witnesses by threats of prosecution. Petitioner's Sixth Amendment rights were violated. Petitioner's right to due process was violated.

B.

In federal criminal proceedings, the right to indictment by an unbiased grand jury is guaranteed by the Fifth Amendment. U.S. v. Serubo, 604 F.2d 807 at 816 (CA3 Pa. 1979) citing Costello v. U.S., 350 U.S. 359, 76 S.Ct. 406, 100

L.Ed.2d 397 (N.Y. 1956); U.S. v. Pabian, 704 F.2d 1533 at 1535 (CA11 Fla. 1983). In Serubo the prosecutor impugned witnesses' honesty and "hectored" other witnesses before the grand jury [604 F.2d 815-816].

Prejudice to the defendant is not required to invoke the supervisory powers of the court. Prejudice is not required to dismiss an indictment for prosecutorial misconduct. Serubo, supra at 604 F.2d 817.

In U.S. v. McKenzie, 678 F.2d 629 (CA5 La. 1982), the Court reached the opposite conclusion. The court held that a showing of prejudice was required [678 F.2d 631], but agreed that the Fifth Amendment required a neutral grand jury [678 F.2d 631-632].

There is no question that Federal Courts may apply their supervisory powers to regulate prosecutorial conduct before a grand jury. See e.g.: U.S. v. Pabian, 704 F.2d 1533 at 1536-1537 (CA11 Fla. 1983). The Court erred in not using its supervisory powers to dismiss Petitioner's indictment.

C.

In this case, government witnesses were intimidated. The trial court denied the Motion to Dismiss without any evidentiary hearing. Such serious threats mandated a due process hearing under the Fifth, Sixth, and Fourteenth Amendments.

The Circuit Court's conclusions that no witness changed his story due to threats is unfounded on the record.

A witness' admission of perjury in his testimony would require the witness' sacrifice of his Fifth Amendment right and is an unreasonable expectation. See e.g.: Mesarosh v. U.S., 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (Pa. 1956).

The affidavits did clearly set forth sufficient threats to warrant an evidentiary hearing and relief if the threats were proven. The U.S. received an indictment based on tainted testimony.

CONCLUSION

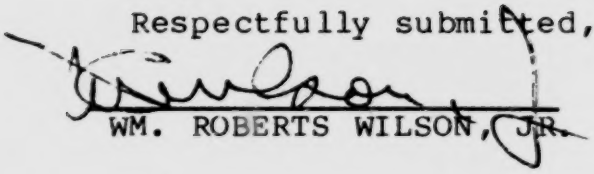
The U.S. prosecutor violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments by outrageous threats of prosecution for perjury, bribing a state judge, and loss of probation. The witnesses, by their affidavits poisoned the water in this

reservoir. This is a federal criminal case and this Court has supervisory jurisdiction over the proceedings of the federal courts. This Court has a duty to see that the waters of justice are not polluted. The government does not need and cannot afford to abide convictions based on such testimony. Mesarosh v. U.S., 352 U.S. 1 at 14, 77 S.Ct. 1 at 8, 1 L.Ed.2d 1 (Pa. 1956).

The lower courts erred in failing to properly exercise their supervisory powers and to grant Petitioner's Motion to Dismiss.

The Court should dismiss the indictment and grant Petitioner's Motion to Dismiss.

Respectfully submitted,

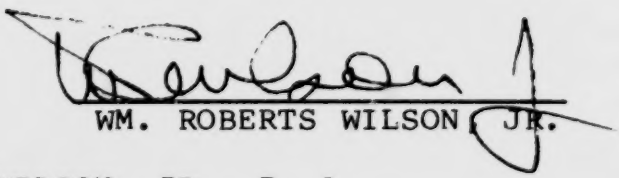


WM. ROBERTS WILSON, JR.

CERTIFICATE OF SERVICE

I WM. ROBERTS WILSON, JR., attorney for WILLIS HOLLOWAY, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to HON. J. B. SESSIONS, III at his usual and customary mailing address of Post Office Drawer E., Mobile, Alabama 36601.

THIS, the 13th day of February, 1986.



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DECEMBER 16, 1985

NO. 84-7321

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

WILLIS WALTER HOLLOWAY, JR., ELWOOD L. HOGAN, JAMES D. SULLIVAN,
Defendants-Appellants

Defendants were convicted in the United States District Court for the Southern District of Alabama, Emmett Ripley Cox, J., of having participated in a scheme to obtain favorable treatment for certain accused persons in cases pending before two state judges, and they appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) dismissal of indictment was not warranted for alleged threats to and

witnesses by the prosecution, and (2) evidentiary hearing was not required on harassment of prospective grand jury witnesses by the prosecution and (2) evidentiary hearing was not required on the motion to dismiss the indictment on such ground.

Affirmed.

Appeals from the United States District Court for the Southern District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Appellants are two former state court judges of Mobile County, Alabama and a lawyer who is alleged to have participated with them in receiving bribes for favorable treatment to certain accused persons in cases pending before

the two judges.

The evidence is overwhelming as to the guilt of the two judges and participation in the scheme by the lawyer. Two other defendants did not appeal.[1] The appellants make no contention here that the evidence was insufficient to support their conviction and they make no complaint as to the sentences although the two judges received 20 year sentences.

The evidence showed that there was a team of six or seven persons including Holloway, the lawyer, three of whom were co-defendants who have not appealed, who

[1]A third defendant failed to file a timely brief and his appeal was dismissed. It has not been reinstated and will be considered as a separate appeal.

are shown to have held out to several persons under indictment in the state courts the ability of certain members of the team to obtain favorable treatment at the hands of Judges Sullivan and Hogan in return for cash payments.

I. ISSUES ON APPEAL

The grounds of appeal asserted by the appellants are as follows:

1. Whether the trial court erred in denying the appellants' motion to dismiss the indictment.

II. Whether the trial court erred in not holding an evidentiary hearing regarding appellants Holloway and Sullivan's motion to dismiss the indictment.

III. Whether the trial court abused its discretion in denying appellant Sullivan's motion for severance.

IV. Whether the prosecution of a state court judge violates the Tenth Amendment to the United States Constitution.

V. Whether the trial court erred in excluding testimony by attorney Robert F. Clark concerning alleged prior inconsistent statements of his client, Lester Pugh.

VI. Whether the agreement between Lester Pugh and the government violated the appellant Hogan's Fifth Amendment rights.

We consider that only the first two grounds merit discussion by this Court.

II. DISCUSSION

The first two of the above issues deal with the allegations made by the appellants that the trial court erred in denying their motion to dismiss the

indictment because they allege that several prospective grand jury witnesses were threatened and harassed by the prosecution to the extent that this amounted to prosecutorial misconduct of a kind that warranted a dismissal of the indictment.

[1] The law dealing with this particular issue makes it plain that if a sufficiently egregious case of prosecutorial misconduct is shown, this Court has the inherent power to direct the indictment to be dismissed. United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983). In Pabian, the Court stated that the dismissal of an indictment on such grounds is an "extreme sanction which should be infrequently utilized." Id. at 1536.

Pabian said:

Although the federal judiciary

> exercises a supervisory role over federal grand juries, that role must be informed by recognition that dismissal of an indictment for prosecutorial misconduct is an "extreme sanction which should be infrequently utilized." United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978).

704 F.2d at 1536.

The government contends that there was no prosecutorial misconduct in this case. It also contends that even though there had been the indictment should not be dismissed without a showing of prejudice to the defendants. That represents the holding of the Court of Appeals for the Fifth Circuit in United States v. McKenzie, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982).[2]

In McKenzie, the Court held that: "Whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed only where the defendant's case has been unfairly prejudiced." 678 F.2d at 631.

The question whether the district court ever may, in exercise of its supervisory authority over the grand jury, dismiss an indictment absent a showing of prejudice to the defendant was not reached by this Court in Pabian, although the issue was spelled out. It became unnecessary because the Court in that case found that there had been no prosecutorial misconduct.

[2]This case is not precedent binding on this Court.

The appellants' argument that this Court should require a dismissal of the indictment on account of egregious prosecutorial misconduct is based on the theory that prospective witnesses, all of whom were suspected by the government to have committed some offense, were told by government agents that their testimony was desired before the grand jury in this case and that the government was in a position to help them if they cooperated, and, correspondingly, was in a position to hurt them if they failed to cooperate. In order to have before it the actual facts as to what was said by way of threats, the trial court required the defendants to file affidavits from such prospective witnesses as they saw fit to support their contention. Affidavits were received from the following prospective grand jury witnesses:

1. Joyce Chapman

She testified that she was the wife of Calvin Chapman and that she was "contacted by FBI agent Christian, a female."

She told me that she understood that I had been arrested within the last several weeks. She told me that "we are responsible for having those charges brought up against you." The charges concerned the case that I had been a defendant in that had been nol prossed in 1981. She also told me that she could help me or hurt me on those charges and help or hurt my husband. She said she wanted some information on Judge Hogan and Mr. Holloway making a deal with my husband to pay $10,000 to give him probation.

I told her that there was no

information that I could give her, that I did not know of any kind of a deal. I told her I could not make up any lies to help myself. She kept repeating that she could help me on my cases. She kept telling me that I was lying. I told her "well, just a little blackmail to hold over my head." She then left....

I was also subpoenaed to appear as a witness before the Grand Jury and was told that I would be prosecuted for perjury if they could prove that I lied. I took this as a threat implying that I should say what they wanted me to say.

Joyce Chapman did not appear as a witness before the grand jury.

2. Thomas M. Withers

Withers' affidavit made no mention of any threat by the FBI or any other

investigator. He was one of the defendants.

3. Frank Parker

I am Frank Parker and I operate a business at 5721 Old Rock Road, Mobile, Alabama. I have been interviewed by FBI agent McFadden. He told me that he had evidence that I had paid money to Dodson Fail to fix a criminal case pending against Gary McCarver. He threatened me with prosecution for bribing a state judge and with prosecution for lying to a Federal Grand Jury if I did not cooperate with him. These allegations were not true and I ordered him to leave my place of business.

Frank Parker testified before the grand jury but he does not now allege that he gave any untruthful statement.

4. Samuel Robert Greene, III

I am Samuel Robert Greene, III. I have been interviewed by FBI agent McFadden at my home at 954 Palmetto Street, Mobile, Alabama. Agent McFadden told me that I had paid $6,000 to fix a case in which I was a defendant in state court. He further told me that he would revoke my probation and charge me with bribing a state judge and perjury before a Federal Grand Jury if I did not cooperate, but nothing would happen to me if I told the Grand Jury what he told me to say.

Greene testified before the grand jury but he does not allege that he was coerced into telling any falsehood.

5. Gary Steven McCarver

I was on probation in state court for an assault conviction and

had a new charge for assault. I was interviewed by FBI agent McFadden who accused me of paying money for fixing my pending case of assault. He threatened me with prosecution for bribing a state judge and for lying to a Federal Grand Jury if I denied this. He told me nothing would happen to me if I cooperated. I did not pay any money to fix my case.

I told the United States Attorney, Jeff Sessions, that I did not have "a sure thing" in my case. I told him this after he had shown me a statement written by McFadden that was not correct. Mr. Sessions gave me a disgusted look and told me that I had better tell the Grand Jury the truth.

McCarver testified before the grand jury

but did not claim to have been overpowered into testifying to any falsehood.

[2] In addition to the above affidavits, affidavits were filed by two lawyers. Both stated that their clients had told them of circumstances that they considered to be threats either by the FBI or by the United States attorney's office. These affidavits, of course, did not subject the prospective witness to prosecution for perjury if their statements were proved to be false. Therefore, they cannot be considered as responding to the court's order, requiring proof "by affidavit or discovery material" as to the alleged government threats.

[3,4] Thus, it appears that not a single prospective witness before the grand jury contended in his or her

affidavit that the so-called "threats" by the government officials had caused him to testify falsely before that body. Moreover, the affidavits contained statements that are largely conclusory, rather than being an actual quotation of the statements made to the prospective witnesses by the prosecution. We disregard the affidavit of Joyce Chapman, because she did not testify before the grand jury at all. As noted above, Withers' affidavit made no mention of any threat. As to Frank Parker, his affidavit stated: "He threatened me with prosecution for bribing a state judge and with prosecution for lying to a federal grand jury if I did not cooperate with him." We do not have the language which Parker construed as "threat" of prosecution. There could be nothing wrong in McFadden's telling Parker that

he would be subject to prosecution for "lying to a federal grand jury," regardless of whether he cooperated with McFadden or not. Greene's affidavit did not give us the language which he claimed McFadden used from which he got the impression that McFadden "would revoke my probation and charge me with bribing a state judge," both state matters, nor is there any suggestion in his affidavit that McFadden "told" him to say anything that was not true. Finally, McCarver's affidavit doesn't seem to us to say anything objectionable. The bottom line of this affidavit is: "He threatened me with prosecution for bribing a state judge and for lying to a Federal Grand Jury if I denied this. He told me nothing would happen to me if I cooperated." This statement is a form of permissible notice that the prosecutor

could proceed against the witness unless he cooperated as a witness for the government and that he would be prosecuted for perjury if he lied. Besides, the affidavit does not include the words used to him by agent McFadden which he construed as being "a threat."

Appellants cite no case which draws the outer limits beyond which the prosecution may not go in seeking the cooperation of prospective witnesses either before a grand jury or for trial, and we have found none. Appellant Sullivan's brief deals with this matter as follows:

> Although in most instances cases of prosecutorial misconduct have involved the knowing use of perjured testimony and entrapment of the defendant by law enforcement officers, defendant has found no

> case which limits prosecutorial misconduct such that would require dismissing an indictment to the above situations.

Appellant's Brief, p. 17. Neither has defendant found a case which provides the limits beyond which the government cannot go in seeking cooperation of a witness.

[5] We take it to be self evident that, so long as it is made known to a defendant in the criminal prosecution, the government may agree not to prosecute a prospective witness if he or she agrees to testify "for" the government. This policy seems thoroughly approved by the Supreme Court in its opinion in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972):

> We need not concern ourselves with the differing versions of the events as described by the two

> assistants in their affidavits. The heart of the matter is that one assistant United States attorney - the first one who dealt with Taliento - now states that he promised to Taliento that he would not be prosecuted if he cooperated with the Government. (Emphasis added.)

Id. at 153, 92 S.Ct. at 765. The Court did not criticize this action by the assistant U.S. Attorney. The Court held that the prosecution was required to notify the defendant of this agreement. The question remains how far may the prosecution go in obtaining such "cooperation."

[6,7] Partially because no witness testified that he was coerced to giving any evidence before the grand jury that was not true and partially because

the affidavits given by the prospective witnesses were largely conclusory in their language, rather than expressly stating facts from which the court could determine that they were actually intimidated, we conclude that the facts before the trial court were neither sufficient to cause the court to dismiss the indictment nor to have a hearing on that issue. The government concedes in its brief that the prevalent rule as to the showing required to entitle a defendant to a hearing on a charge of prosecutorial misconduct is that if defendants "raise a material fact which, if resolved in accordance with the defendants' contentions, would entitle them to relief, they would be entitled to a hearing." Gov.Br., pp. 85, 86, citing U. S. v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980).

After stating that the "defendant has made no showing by affidavit or otherwise that the alleged misconduct is prejudicial to the defendant," the Court also said: "The facts presented by the defendant, even if assumed to be true, do not constitute misconduct which warrants dismissal of the indictment." The Court also noted the important fact that all of the witnesses before the grand jury were available for cross-examination as to this precise question during the trial. Noticeably, very little effort was made at the trial to prove the truth of the contention that any of the witnesses had been intimidated.

As we did in the Pabian case, we hold that there was no showing of prosecutorial misconduct in this case. It is, therefore, unnecessary for us to determine "whether a district court ever

may, in exercise of its supervisory authority over the grand jury, dismiss an indictment absent a showing of prejudice ot the defendant." United States v. Pabian, supra, at p. 1540.

There is authority for both positions on this issue. As noted above, the Court of Appeals for the Fifth Circuit in United States v. McKenzie, supra, held that "whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed only where the defendant's case has been unfairly prejudiced." 678 F.2d at 631.

Contrariwise, the Court of Appeals for the Third Circuit in United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), has held that dismissal of an indictment in exercise of the supervisory power may be

an appropriate remedy to correct flagrant prosecutorial misconduct despite the absence of prejudice to the defendant. See Serubo, 604 F.2d at 817. We follow the precept of the Pabian case: "We save that issue for another day." 704 F.2nd at 1540.

The judgments are AFFIRMED.